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HAROLD B. WILLEY, C

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 859

HARRY SEARS, Trustee, and NEVADA INVESTMENT AND FINANCE CORPORATION, a Corporation,

Appellants,

vs.

COUNTY OF CALAVERAS, STATE OF CALIFORNIA, GEORGE G. BRADDOCK, A. J. GIANELLI, MARVIN L. WATERS, CLAUDE T. SMITH, FRANK A. CRESPI, FRANK LANGFORD and BOARD OF SUPERVISORS OF CALAVERAS COUNTY,

Appellees.

Appeal from the Supreme Court of the State of California.

BRIEF OPPOSING MOTION TO DISMISS.

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Appellees.

Appeal from the Supreme Court of the State of California.

BRIEF OPPOSING MOTION TO DISMISS.

This case presents the question whether a State statute which provides, or is interpreted to provide, lapse of time bars the right of an owner of real

property who is in complete, actual, uninterrupted physical possession to bring an action to remove a cloud on his title asserted by an adverse claimant who has never been in possession, deprives that owner of his property without due process of law.

This question has not been decided by this Court since the Fourteenth Amendment to the United States Constitution became effective.

Appellees move to dismiss this appeal. First, they contend this constitutional question was not properly raised. Second, they contend this constitutional question is not presented. Third, they contend that if this constitutional question is presented it is not substantial. In demonstrating their contentions they misrepresent the case.

HOW THE QUESTION AROSE.

Appellants own five parcels of land in California. California law allows the County of Calaveras to levy and collect an annual tax upon that land. The statutes which give the County of Calaveras that power also provide a method for the lawful exercise of that power, and provide that if that power is lawfully exercised and the appellants do not pay the tax levied ownership of their property is transferred to the State of California. These statutes also provide for sufficient notice and opportunity for a hearing so that they fully meet the due process requirements of the

Fourteenth Amendment to the United States Constitution.

Chapman v. Zobelein (1915), 237 U.S. 135, 35 S.Ct. 518, 59 L.Ed. 874.

Calaveras County did not follow the method provided by the statutes in taxing or in enforcing collection of the tax levied upon appellants' property. Instead Calaveras County took a different method, one which the Courts of California have repeatedly held to be ineffective and void, to create no rights, and to pass no title to the State of California.[1]

The State of California attempted to correct these totally void proceedings by adopting a curative act.[2] The California Supreme Court twice held this act was ineffective to cure the State's defective title if a third person (appellants here) had acquired title[3] after the void tax proceedings and before the curative act was passed.[4]

In spite of these decisions appellees assert that these wholly void tax proceedings transferred ownership of appellants' property to the State of California, with

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[1]*Brady v. Kelly* (1877), 52 Cal. 371;
Knox v. Higby (1888), 76 Cal. 264, 18 Pac. 381;
Gillis v. Cleveland (1890), 87 Cal. 214, 218, 25 Pac. 351;
Stege v. City of Richmond (1924), 194 Cal. 305, 317, 228 Pac. 461 (error dismissed), 273 U.S. 648, 47 S. Ct. 245, 71 L. Ed. 821;
Gottstein v. Kelly (1929), 206 Cal. 742, 276 Pac. 347.
See Jurisdictional Statement, p. 9.

[2]California Statutes 1943, Chapter 458, page 1993.

[3]See Jurisdictional Statement, Appendix p. ii.

[4]*Miller v. McKenna* (1944), 23 Cal. (2d) 774, 147 P. (2d) 531;
Hall v. Chamberlain (1948), 31 Cal. (2d) 673, 192 P. (2d) 759.

the right to force a sale of the properties unless appellants pay appellees a sum which appellees designate "redemption penalties". Under existing California law appellees have no right to cause the sale nor to demand the penalties.

The threat from such a cloud impairs the value of appellants' properties and is as much a taking of appellants' properties, within the meaning of the Fourteenth Amendment to the United States Constitution, as would be the evicting of appellants and excluding them of all indicia of ownership.

Campbell v. Holt (1885), 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483;

Buchanan v. Warley (1917), 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149;

Terrace v. Thompson (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255;

Tyson & Bro. v. Banton (1926), 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718.

This action was filed for the purpose of removing that cloud so it would no longer impair the value of appellants' properties. Appellees interposed a demurrer contending that sections 175 and 3521 of the Revenue and Taxation Code of the State of California[5] bar the action.

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[5]For text see Jurisdictional Statement, p. 7.

THE CONSTITUTIONAL QUESTION WAS PROPERLY RAISED.

The California law permits no responsive pleading to a demurrer,[6] hence appellants' opposition to the demurrer asserting the unconstitutionality of applying the statutes of limitations to bar an owner in possession is not in the written record. The only reason appellants alleged that they were in actual physical possession[7] was because in the Court of first instance appellants took a dual position. First, they contended that the statutes of limitations pleaded should be construed so as not to run against an owner in possession.[8] This was a question of State law. Second, appellants argued that if the statutes of limitations were construed to bar an action by an owner

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[6]California Code of Civil Procedure, Section 422, provides:
"The only pleadings allowed on the part of the plaintiff are: 1. The complaint; 2. The demurrer to the answer; 3. The demurrer to the cross-complaint; 4. The answer to the cross-complaint."

[7]The California Supreme Court said:
"It is alleged and therefore an admitted fact, that the plaintiffs were in the exclusive and undisputed possession of the property during all of the times involved." (Jurisdictional Statement, Appendix, pp. ii-iii.)

[8]The California Supreme Court said:
"The contention that a statute limiting the time for the commencement of an action to set aside a deed to the state for delinquent taxes does not apply to an owner in exclusive and undisputed possession of the property taxed, is largely based on a rule stated to be that a general statute of limitations does not run against such an owner to remove a cloud upon his title. It may be assumed that such is the general rule. See Maguire v. Hibernia S. & L. Soc., 23 Cal. 2d 719; Newport v. Hatton, 195 Cal. 132; Secret Valley Land Co. v. Perry, 187 Cal. 420; S. F. Unified School District v. City & County of San Francisco, 54 Cal. App. 2d 105; Crane v. French, 39 Cal. App. 2d 642; Faria v. Bettencourt, 100 Cal. App. 49, 51-52." (Jurisdictional Statement, Appendix p. iv.)

in complete, actual, uninterrupted physical possession of real property those statutes, or such a construction of those statutes, would violate the Fourteenth Amendment of the United States Constitution. This was a federal question. Appellants have pressed both positions consistently ever since.[9] The basis for appellants' second contention, defending against the demurrer, was statements of the Supreme Court of the State of California in *Tannhauser v. Adams* (1947), 31 C. (2d) 169, 174-176, which infer that the statutes of limitations involved could not run against an owner of real property in possession, and 34 *American Jurisprudence,* pages 29 and 296, is cited with approval.[10]

THE CONSTITUTIONAL QUESTION IS PRESENTED BY THIS CASE.

Contrary to the contention of appellees, the California Supreme Court did not declare valid either the tax sale or the tax deed which were attacked by this action. This quesiton was never presented to the California Court, because in sustaining the demurrer based upon the Statutes of Limitations the Court dismissed the action, holding it was filed too late. This ruling made a decision on the merits of the cause of action neither necessary nor proper. Nor did the California Supreme Court overrule any of its prior decisions holding such a tax sale or such a tax deed void,[11] or

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[9]See Jurisdictional Statement, pages 10-11.

[10]See Opinion of the Supreme Court, Appendix vi.

[11]See cases cited in footnote 1.

not subject to correction by a curative act passed after a third person had acquired ownership following the void tax sale or void tax deed.[12] The language quoted by appellees[13] is dictum. The California Supreme Court squarely held:

> "It is concluded that the plaintiffs are barred by statute from attacking the tax deed and all proceedings prior to its issuance and recordation."
> Jurisdictional Statement, Appendix, p. vii.

After conceding the general rule that a statute of limitations does not run against an owner in possession,[14] the California Supreme Court held:

> "But the general rule does not apply as against a special statute of limitation foreclosing the commencement of an action to set aside a deed to the state for delinquent taxes beyond one year from and after the recording of the deed to the state."
> Jurisdictional Statement, Appendix, p. v.

The California Supreme Court gave its reason for deciding that sections 175 and 3521 of the Revenue and Taxation Code of California bar an action by an owner in complete, actual, uninterrupted physical possession:

> "If the contention of the plaintiffs should prevail the finality of tax proceedings would be thrown into confusion. The validity of tax deeds as against an owner in possession of real property would be placed in suspension for an indefinite

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[12]See cases cited in footnote 2.
[13]Motion to Dismiss, p. 9, footnote.
[14]See footnote 8, supra.

period and until at his election he chose to attack it. Without limit of time he could defend against it. There appears to be no reason why an owner of land, although in exclusive and undisputed possession, should not be required to be alert to protect his rights as against his own delinquency in the payment of taxes. He is charged with notice that if he claims the invalidity of a tax deed to the state or of the proceedings leading up to it he must bring his action for that purpose within the statutory time."

Jurisdictional Statement, Appendix, p. v.

The California Supreme Court explained the effect which it desired by its construction of these sections:

"The improper creation of the tax lien and recordation of the deed to the state do more than merely give rise to a permissible cause of action in favor of the land owner. They also start the running of the special statute of limitations applicable to such an owner. If he does not move to protect his rights as against the tax by payment, redemption, or timely and successful attack upon the tax deed or the proceedings leading up to it, *he is divested of his title. After the statutory period has run the tax deed transfers the title by operation of law from the owner of the property to the state the same in effect as a voluntary grant.*" (Emphasis ours.)

Jurisdictional Statement, Appendix, pp. v-vi.

The decision of the California Supreme Court from which this appeal is taken is therefore a positive determination that Sections 175 and 3521 of the Revenue and Taxation Code of California bar an owner in

complete, actual, uninterrupted physical possession from attacking a tax deed because to rule otherwise would render void tax proceedings subject to attack indefinitely. It is a declaration that the effect of the running of the statute of limitations is to transfer the title of the owner in possession to the State of California with the same effect as a voluntary grant. Appellants contend this procedure violates the due process requirements of the Fourteenth Amendment to the United States Constitution, and raises the constitutional question which this case presents.

Although the California Supreme Court said:

> "There is no contention that it is not within the power of the state, through its legislature, to provide for such statutes of limitations as those now before us. As applied to the facts in this case there can be no question of their validity and proper application."
>
> Jurisdictional Statement, Appendix, p. vii.

this statement ignores the admitted fact that appellants raised this constitutional question before the Appellate Courts of California.[15] There is no requirement that a party labor a point or be deemed to have waived it.

It follows that if an owner, whose possession and enjoyment of real property has never been disturbed, cannot be divested of all indicia of ownership merely by the running of a statute of limitation, the fact that he may ransom his property by paying "redemption

[15]Jurisdictional Statement, pages 10-11, Motion to Dismiss, pages 6-8.

penalties" which could not have been legally collected if the statute of limitations had not run, leaves the owner none the less deprived of property without due process within the meaning of the Fourteenth Amendment to the United States Constitution.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The effect of the decision of the California Supreme Court is that totally void tax proceedings may be made valid by the running of a statute of limitations. The mere passage of time "transfers the title by operation of law from the owner of the property to the state the same in effect as a voluntary grant."[16] Neither a hearing nor notice is provided.

While statutes of limitations which bar the right of one out of possession to bring an action to recover property have uniformly been upheld, statutes which convert the ownership of one in full, complete, undisturbed possession of real property into a mere cause of action against another who has never been in possession have uniformly been held by the State Courts to deprive the owner of his property without due process of law.[17]

If the decision of the California Supreme Court should be followed by other Courts as a holding that statutes of limitations operate to divest the property

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[16]Taken from Opinion of the California Supreme Court, Jurisdictional Statement, Appendix, p. vi.

[17]See Jurisdictional Statement, pp. 5-6, for the cases.

of an owner who is in full, complete, undisturbed possession of it, there is no limit to the extent legislatures may go in validating totally void acts of the State, as well as those of private citizens.[18]

Two concepts must be kept in mind. First, the proceedings by which the State of California derived title were wholly void and ineffective for that purpose. Second, the State of California never attempted by interfering in any way with appellants' full enjoyment of their property to exercise any of the rights it claims to have acquired. The State of California has been more neglectful than appellants. Appellants have enjoyed rights which they claim, whereas appellees have not enjoyed any of the rights which they assert.

If the decision of the California Supreme Court is permitted to stand, all legal requirements for levy and collection of taxes can be discarded. Any tax, no matter how levied, and any enforcement proceedings, no matter how conducted, will become valid at the end

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[18]In 1953 the California Legislature adopted Stats. 1953, Ch. 1655, Sec. 1(b), (Section 177(b) Revenue & Taxation Code of California), which provides:

> "A defense based on an alleged invalidity or irregularity of any deed heretofore or hereafter issued upon the sale of property by any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, in the enforcement of delinquent property taxes or assessments, or a defense based on an alleged invalidity or irregularity of any proceedings leading up to such deed, can only be maintained in a proceeding commenced within one year after the date of recording of such deed in the county recorder's office or within one year after June 1, 1954, whichever is later."

The validity of that statute is not involved in this case, but it is illustrative of how far State legislatures try to extend statutes of limitations to correct and validate totally void acts of incompetent or careless public officers and to divest people of their property.

of a year unless within that time the property owner takes affirmative action to obtain a judicial declaration that what is null and void in fact is equally null and void in law.

The question whether the Fourteenth Amendment to the United States Constitution permits a State to transfer to itself the title of an owner who is in actual, undisturbed physical possession of his land merely by passage of time, during which the State makes no effort to enforce the ownership it asserts, is serious and substantial, and should not be resolved without a hearing, after the law involved has been fully briefed.

Dated, Berkeley, California,
May 21, 1956.

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